A

DATUK BANDAR MAJLIS BANDARAYA SHAH ALAM & ANOR

v.

B

YUSUF AWANG & ORS

COURT OF APPEAL, PUTRAJAYA
DENIS ONG JCA
MOHD GHAZALI YUSOFF JCA
JAMES FOONG JCA
C [CIVIL APPEAL NO: B-01-67-2004]
9 FEBRUARY 2007

LOCAL GOVERNMENT: *Squatters - Removal of - Demolishment of squatter huts - Whether notices issued by local authority pursuant to reg.*
D *10 of the Essential (Clearance of Squatters) Regulations 1969 valid - Whether local authority ought to be restrained from evicting alleged squatters by any matter whatsoever from said land - Essential (Clearance of Squatters) Regulations 1969, regs. 3, 10*

E ***LOCAL GOVERNMENT:*** *Buildings - Demolition - Demolishment of squatter huts and removal of squatters - Whether notices issued by local authority pursuant to reg. 10 of the Essential (Clearance of Squatters) Regulations 1969 valid - Whether local authority ought to be restrained from evicting alleged squatters by any manner whatsoever from said land*
F *- Essential (Clearance of Squatters) Regulations 1969, regs. 3, 10*

LAND LAW: *Trespass - Unlawful occupation - Removal of squatters and demolishment of squatter huts - Whether notices issued by local authority pursuant to reg. 10 of the Essential (Clearance of Squatters) Regulations 1969 valid - Whether local authority ought to be restrained*
G *from evicting alleged squatters by any manner whatsoever from said land - Essential (Clearance of Squatters) Regulations 1969, regs. 3, 10*

The 1st appellant, the Mayor of the Shah Alam City Council, and the 2nd appellant (the Shah Alam City Council), a local authority
H within the meaning of the Local Government Act 1976 ('Act'), served notices ('said notices') pursuant to reg. 10 of the Essential (Clearance of Squatters) Regulations 1969 ('said Regulations') on the respondents, individuals who were occupants of two pieces of land in Mukim Kapar, Daerah Klang, Selangor ('said property').
I The said notices essentially informed the respondents that they had constructed or were occupying squatter huts on the said

property and thus had committed an offence under the said Regulations. As such, they were required to remove any person or moveable property and demolish their respective squatter huts within seven days from the date of the said notices. It was stated therein that if the respondents failed to comply with the said notices, the appellants would take the necessary action. The respondents filed an originating summons against the appellants (encl. 1), praying for the following reliefs: (i) that the said notices issued by the appellants under reg. 10 of the said Regulations be declared as null and void; and (ii) that the appellants be restrained from evicting the respondents by any manner whatsoever from the said property including harassing and threatening the respondents. The learned High Court judge found for the respondents, resulting in the present appeal by the appellants.

Held (allowing the appeal)
Per Mohd Ghazali Yusoff JCA delivering the majority judgment of the court:

(1) Under the circumstances of this instant appeal, all that the second appellant needed to do was, once it was of the opinion that it was expedient and necessary to demolish any squatter hut as defined under reg. 3 of the said Regulations on the said property, to give seven days notice to the respondents and at the end of that period, enter the said property for the purpose of demolishing the squatter huts. Although it was argued that the said notices were not dated and hence null and void, this omission, if at all it was one, could not nullify the said notices. The respondents could not dispute that they were not aware of the said notices since they had deemed it fit to challenge the said notices by pursuing this application. On the facts, the said notices were served on them in compliance with the provisions of s. 108 of the Act. The evidence showed that they were served on the 1st to 9th respondents on 15 October 2003 and the 10th to 12th respondents on 16 October 2003. As they were not dated, the seven-day period would run from the date of service of the said notices. The said notices clearly stated that the occupier of the squatter huts had seven days to move any moveable property from the premises and to demolish the squatter huts. Regulation 10 of the said Regulations clearly states a local authority may enter the private land in question "after giving

A seven days' notice to the occupier" to demolish the squatter huts, and time would start running from the date such a notice is served. As such, the argument that the said notices were defective as they were undated or that they were misleading could not hold water, and the respondents were not B prejudiced by this omission. (paras 17 & 18)

(2) Another point canvassed by the respondents was that the appellants failed to establish that the respondents were squatters. The issue in the instant appeal was whether the C buildings erected and owned by the respondents were "squatter huts". The definition of "squatter huts" in reg. 3 of the said Regulations is very clear and s. 101(1) of the Evidence Act 1950 provides "whoever desires any court to give judgment as to any legal right or liability, dependant on D the existence of facts which he asserts, must prove that those facts exist". Thus, the respondents must prove that their respective buildings were erected with plans approved by the local authority *ie*, the second appellant. The respondents had not even shown that they were in lawful occupation of the E said property. It was an undisputed fact that the registered owner of the said property was one Hock Hup Developments Sdn Bhd (now known as Ken Rimba Jaya Sdn Bhd) and not the respondents. Being squatters, having not shown otherwise, they had no right in law or in equity. (para 19)

F **(3)** There was no merit in relation to the respondent's argument that the appellants were not the registered proprietors under the National Land Code ('Code'). Regulation 10 of the said Regulations clearly provides that a local authority may enter G any private land for the purpose of demolishing any squatter hut. Thus, there was no reason for this argument to be canvassed when it had no bearing at all on the matter before this court. In the same light, there was no need for the respondent to point out to this court that the appellants were H not the "State Authority" under the Code. Under the Code, the term "State Authority" means the Ruler or Governor of the State, as the case may be. Nowhere in the appeal record could it be found that the appellants had contended that they were the "State Authority". (para 20)

I

(4) In light of the articles of the First Part of the Laws of the Constitution of Selangor and the provisions of the Act, the views of the learned judge in relation to reg. 10 of the said Regulations could not be fathomed. The "direction of the State Secretary" of Selangor certainly cannot be said to be "irrelevant" as put by the learned judge. Consequently, the State Authority is clearly entitled, by virtue of s. 9 of the Act, to give directions to a local authority on policy matters and the local authority "shall as soon as possible give effect to all such directions" which would certainly include exercising its powers under reg. 10 of the said Regulations. In relation to this, the learned judge had misconstrued reg. 10 of the said Regulations by reading into it "preconditions", as he put it, which had to be satisfied by the appellants before reg. 10 could be invoked. (para 29)

(5) The learned judge had erred in approaching this matter as if it were a judicial review as his main ground for allowing the declaration was based on his findings on the "decision-making process" of the appellants *viz*. he reviewed the appellants' decision-making process and came to the conclusion that it was flawed and, hence, quashed that decision by concluding that it contravened the said Regulations. (para 30)

(6) The learned judge also erred in granting the second prayer *viz*. the perpetual injunction. The effect of the perpetual injunction granted in this instant appeal would be tantamount to the respondents having established their right to continue to occupy the squatter huts erected on the said property, and that the appellants could not take any fresh action or act further under reg. 10 of the said Regulations against the respondents. To grant the perpetual injunction under the circumstances of this case would have the effect of nullifying the said Regulations. The appellants have a statutory duty to perform under the said Regulations and once they decide to act under the same, they cannot be prevented from doing so by a perpetual injunction. (paras 31, 32 & 34)

(7) The respondents had not shown that there was a threatened invasion of their legal rights. The court of course has jurisdiction to protect property from an act threatened. But then the court, before granting an injunction to restrain the

appellants from interfering with the respondents' occupation or possession, must first go into the question of the respondents' right to occupy the said property. This, the learned judge had failed to do. As stated earlier, this was not a case of a judicial review of the appellants' decision or an abuse of discretion in the exercise of powers under the said Regulations or a case where statutory regulations conferring powers on an authority for one purpose had been used for a different purpose. The respondents had to show that they were not squatters, that they had a legal right to occupy the land and that their abode was not a squatter hut. This, they failed to do. (para 35)

Per James Foong JCA (dissenting) (allowing the appeal in part):

(1) There must have been a date when the said notices were issued but this date was not written or printed on the said notices. This fact could not be denied. Without a date of issuance, the respondent could not know when the seven-day period was to commence. The exact period for compliance with the said notices was essential for it accorded the respondents an opportunity to pack and go if they were residing in squatter huts to avoid any drastic action of the appellants to demolish their structures and to evict them. This grace period of seven days is based on humanitarian grounds otherwise the makers of such law would not have inserted this requirement into the said Regulations. For this, it was essential for the appellants to specifically inform the respondents when this seven-day period was to commence for without this lead time so given, it could not be said when time begins to tick. Since the said notices were without a commencement date, they were therefore invalid and bad in law. On this ground alone, prayer 1 of encl. 1 should be allowed. (paras 52 & 53)

(2) Regulation 10 of the said Regulations is not concerned with the right of a person to be on the land. It relates only to the structure on the land known as "squatter hut" which is defined under reg. 3 of the said Regulations. So, reading this provision with reg. 10, the appellants can, if they are of the opinion that it is expedient and necessary, after giving the occupant of such structure a seven-day notice and upon termination of this period stated in the notice, proceed to

demolish such structure. There is nothing in this regulation to say that the occupant of such structure must be a squatter or be proved a trespasser. As long as the conditions mentioned in reg. 10(1) of the said Regulations are fulfilled, the appellants are at liberty to carry out demolition and eviction. Therefore, to speak of the right to occupy the land on which the squatter huts were erected and of the absence of evidence to prove that the respondent were squatters was completely irrelevant and off the mark. (paras 56 & 57)

(3) Although the appellants may have made a slip by not inserting a date when issuing the said notices, this should not prevent the appellants from carrying out their lawful duties again if circumstances warrant them to do so, and if they comply with the conditions set out in reg. 10(1) of the said Regulations. Thus, if the 2nd prayer of encl. 1 were allowed, it would permanently prevent the appellants from taking any action against the respondents regardless of whether their structures on the said land were squatter huts. This was neither fair nor reasonable. If permitted, the appellants would be perpetually prohibited from carrying out their legal duties under the law even under different circumstances. Such order, if granted, would tantamount to a perpetual injunction with far-reaching consequences. First, it would indirectly create a perpetual right for the respondents to remain permanently on the said land with the structures. Second, this could even prevent the registered owner of the said land from seeking assistance from the appellants under regs. 6(1) and 7 of the said Regulations to assist in evicting the respondents from the said land if their structures were found to be squatter huts. (para 58)

Bahasa Malaysia *translation of headnotes*

Perayu pertama, Datuk Bandar Majlis Bandaraya Shah Alam, dan perayu kedua (Majlis Bandaraya Shah Alam), sebuah pihak berkuasa tempatan menurut maksud Akta Kerajaan Tempatan 1976 ('Akta'), telah mengeluarkan notis (notis-notis tersebut') di bawah per. 10 Peraturan-Peraturan Perlu (Pembersihan Setinggan) 1969 ('Peraturan tersebut') terhadap responden-responden, iaitu penghuni-penghuni dua bidang tanah dalam Mukim Kapar, Daerah Klang, Selangor ('tanah tersebut'). Notis-notis tersebut secara pentingnya memberitahu responden-responden bahawa mereka

telah membina atau menghuni pondok-pondok setinggan di atas tanah tersebut dan kerana itu telah melakukan satu kesalahan di bawah Peraturan tersebut. Sekaligus, ia mengkehendaki supaya responden-responden mengalih harta-harta boleh alih mereka serta merobohkan pondok-pondok setinggan mereka dalam masa seminggu notis diberi. Notis juga menyatakan bahawa jika responden-responden gagal berbuat demikian, maka perayu-perayu akan mengambil langkah yang sewajarnya. Berikutnya, responden-responden telah memfail saman pemula terhadap perayu-perayu (lampiran 1), memohon relif-relif berikut: (i) bahawa notis-notis tersebut yang dikeluarkan oleh perayu di bawah per. 10 Peraturan tersebut diisytiharkan tak sah dan batal; dan (ii) bahawa perayu-perayu dihalang dari mengeluarkan responden-responden dari tanah tersebut dengan apa cara sekalipun termasuk dengan cara mengganggu atau mengugut responden-responden. Yang arif hakim Mahkamah Tinggi memutuskan untuk responden-responden dan perayu-perayu merayu.

Diputuskan (membenarkan rayuan)
Oleh Mohd Ghazali Yusoff HMR menyampaikan penghakiman majoriti mahkamah:

(1) Dalam halkeadaan rayuan di sini, apa yang perayu kedua perlu lakukan, sebaik sahaja ia berpendapat bahawa adalah wajar dan perlu untuk merobohkan mana-mana pondok setinggan seperti yang ditafsirkan di bawah per. 3 Peraturan tersebut di tanah tersebut, adalah dengan memberi tujuh hari notis kepada responden-responden, dan di akhir tempoh itu memasuki tanah tersebut untuk merobohkan pondok-pondok setinggan berkenaan. Walaupun ianya dihujahkan bahawa notis-notis tersebut tidak bertarikh dan kerana itu tak sah dan batal, kecacatan ini, jikapun benar berlaku, tidak boleh membatalkan notis-notis tersebut. Responden-responden tidak boleh mengatakan bahawa mereka tidak menyedari tentang notis-notis tersebut kerana mereka telah pun memulakan tindakan di sini dan mencabar notis-notis tersebut. Berdasarkan fakta, notis-notis tersebut telah diserah kepada mereka selaras dengan kehendak s. 108 Akta. Keterangan menunjukkan bahawa ia telah diserah kepada responden-responden pertama hingga kesembilan pada 15 Oktober 2003 dan responden-responden kesepuluh hingga kedua belas pada 16 Oktober 2003. Oleh kerana ia tidak bertarikh, tempoh 7 hari akan

bermula dari tarikh notis-notis tersebut diserahkan. Notis-notis tersebut jelas menyatakan bahawa penghuni pondok-pondok setinggan mempunyai 7 hari untuk memindahkan barang-barang boleh alih dari premis-premis dan untuk merobohkan pondok-pondok setinggan. Peraturan 10 Peraturan tersebut jelas menyatakan bahawa sebuah pihak berkuasa tempatan boleh memasuki tanah-tanah persendirian tersebut "selepas memberi notis 7 hari kepada penghuninya" untuk merobohkan pondok-pondok setinggan, dan masa akan bermula dari tarikh notis tersebut diserahkan. Oleh itu, hujah bahawa notis-notis tersebut defektif kerana tidak bertarikh atau bahawa ianya mengelirukan adalah tidak berasas dan responden-responden juga tidak diprejudis oleh ketinggalan ini.

(2) Satu perkara lagi yang dibangkitkan oleh responden-responden adalah bahawa perayu-perayu gagal membuktikan bahawa responden-responden adalah golongan setinggan. Isu di sini adalah sama ada bangunan-bangunan yang didirikan dan dihuni oleh responden-responden merupakan "pondok-pondok setinggan". Definasi "pondok setinggan" di dalam per. 3 Peraturan tersebut adalah jelas dan s. 101(1) Akta Keterangan 1950 memperuntukkan "whoever desires any court to give judgment as to any legal right or liability, dependant on the existence of facts which he asserts, must prove that those facts exist". Oleh itu, responden-responden bertanggungan untuk membuktikan bahawa bangunan-bangunan yang mereka dirikan tersebut telah mendapat kelulusan pelan dari pihak berkuasa tempatan, iaitu perayu kedua di sini. Hakikatnya adalah, responden-responden tidak mampu walaupun hanya untuk membuktikan bahawa mereka menduduki tanah tersebut secara sah. Tidak dinafikan bahawa pemilik berdaftar tanah tersebut adalah seorang Hock Hup Developments Sdn Bhd (kini dikenali sebagai Ken Rimba Jaya Sdn Bhd) dan bukannya responden-responden. Sebagai setinggan, responden-responden tidak mempunyai hak sama ada di sisi undang-undang mahupun ekuiti.

(3) Tidak ada merit dalam dakwaan responden-responden bahawa perayu-perayu bukan pemilik berdaftar di bawah Kanun Tanah Negara ('Kanun'). Peraturan 10 Peraturan tersebut menyatakan dengan jelas bahawa sebuah pihak berkuasa tempatan boleh memasuki mana-mana tanah persendirian untuk

tujuan merobohkan pondok-pondok setinggan. Oleh itu, tiada sebab mengapa soal ini perlu dibangkitkan memandangkan ia langsung tidak kena mengena dengan halperkara yang ada di hadapan mahkamah. Begitu juga, tiada keperluan untuk responden-responden memberitahu mahkamah bahawa perayu-perayu bukan "Pihak Berkuasa Negeri" di bawah Kanun. Di bawah Kanun, ungkapan "Pihak Berkuasa Negeri" bermaksud Raja atau Gabenor Negeri yang berkaitan. Di dalam rekod rayuan, tiada satu apapun yang menunjukkan bahawa perayu-perayu mengatakan bahawa mereka adalah "Pihak Berkuasa Negeri".

(4) Mengambil kira fasal-fasal Bahagian Pertama Undang-undang Perlembagaan Negeri Selangor dan peruntukan-peruntukan Akta, pandangan yang arif hakim berkaitan per. 10 Peraturan tersebut sukar diselami. "Arahan Setiausaha Kerajaan" Negeri Selangor pastinya tidak boleh dikatakan "tidak relevan" sepertimana yang dikatakan oleh yang arif hakim. Pihak Berkuasa Negeri jelas berhak, berdasarkan s. 9 Akta, untuk memberi arahan-arahan kepada pihak berkuasa tempatan berhubung perkara-perkara polisi di mana pihak berkuasa tempatan "hendaklah dengan seberapa segera mematuhi arahan-arahan tersebut" dan ini tentunya termasuk melaksanakan kuasa-kuasanya di bawah per. 10 Peraturan tersebut. Sehubungan dengan itu, yang arif hakim telah tersalah tafsir per. 10 Peraturan tersebut apabila membaca "syarat-syarat duluan" ke dalamnya yang, menurut beliau, perlu terlebih dahulu dipenuhi oleh perayu-perayu sebelum per. 10 boleh digunapakai.

(5) Yang arif hakim khilaf dalam mendekati persoalan di sini seolah-olah ianya suatu semakan kehakiman. Alasan utama beliau dalam membenarkan deklarasi adalah didasar kepada dapatan beliau berkaitan "proses membuat keputusan" perayu-perayu, iaitu beliau telah menyemak proses membuat keputusan perayu-perayu sebelum merumuskan bahawa ia adalah cacat sekaligus mewajarkannya membatalkan keputusan berkenaan atas alasan melanggar Peraturan tersebut.

(6) Yang arif hakim juga khilaf apabila membenarkan permohonan kedua, iaitu injunksi kekal. Kesan injunksi kekal itu adalah responden-responden seolah-olah telah membuktikan hak mereka untuk terus menduduki pondok-pondok setinggan yang

dibina di atas tanah tersebut, dan bahawa perayu-perayu tidak boleh mengambil tindakan baru atau bertindak selanjutnya di bawah per. 10 Peraturan tersebut terhadap mereka. Membenarkan injunksi kekal dalam halkeadaan rayuan di sini bererti membatalkan Peraturan tersebut. Perayu-perayu mempunyai tanggungjawab statutori untuk dilaksanakan di bawah Peraturan tersebut, dan sebaik mereka memutuskan untuk bertindak dibawahnya maka mereka tidak boleh dihalang dari berbuat demikian oleh suatu injunksi kekal.

(7) Responden-responden tidak menunjukkan bahawa terdapat ancaman pencerobohan terhadap hak-hak mereka di sisi undang-undang. Mahkamah pastinya mempunyai bidangkuasa untuk menghalang ancaman pencerobohan terhadap sesuatu hartanah. Walaupun begitu, sebelum membenarkan injunksi menghalang perayu-perayu dari mengganggu milikan atau kepenghunian responden-responden di atas tanah, mahkamah harus terlebih dahulu meneliti hak responden-responden untuk menduduki tanah tersebut. Ini tidak dibuat oleh yang arif hakim. Seperti yang dijelaskan sebelum ini, ini bukanlah satu kes semakan kehakiman terhadap keputusan perayu-perayu. Ia juga bukan satu kes salahguna budibicara ketika melaksanakan kuasa di bawah Peraturan tersebut atau kes di mana kuasa yang diberi oleh statut kepada pihak berkuasa untuk membuat sesuatu diguna untuk tujuan-tujuan lain. Responden-responden mesti membuktikan bahawa mereka bukan setinggan-setinggan, bahawa mereka mempunyai hak di sisi undang-undang untuk menduduki tanah dan bahawa rumah mereka bukanlah pondok setinggan. Ini gagal dibuktikan oleh mereka.

Oleh James Foong HMR (menentang) (membenarkan rayuan sebahagiannya):

(1) Notis-notis tersebut pastinya dikeluarkan pada satu tarikh tetapi tarikh tersebut tidak ditulis atau dicetak padanya. Ini tidak boleh dinafikan. Tanpa tarikh ianya dikeluarkan, responden-responden tidak dapat mengetahui bilakah tempoh tujuh hari itu bermula. Kepastian tentang tempoh untuk mematuhi notis-notis tersebut adalah penting kerana ia memberi peluang kepada responden-responden untuk mengemaskan barang-barang dan keluar dari tanah jika betul mereka menduduki pondok-pondok setinggan bagi mengelakkan

tindakan drastik perayu-perayu merobohkan kediaman dan mengusir mereka. Tempoh anugerah ini adalah bersumber kepada alasan kemanusiaan, dan itu adalah sebabnya mengapa penggubal-penggubal memasukkannya ke dalam Peraturan tersebut. Maka itu, adalah penting bagi perayu-perayu memberitahu responden-responden dengan secara spesifik bilakah tempoh tujuh hari tersebut bermula. Tanpa tarikh mula ini, tentulah tidak dapat dikatakan bilakah masa akan mula berjalan. Oleh kerana notis-notis tersebut tidak mengandungi tarikh mula, maka ia adalah tak sah dan batal di sisi undang-undang. Atas alasan ini sahaja prayer 1 lampiran 1 sudah boleh dibenarkan.

(2) Peraturan 10 Peraturan tersebut bukanlah peruntukan mengenai hak seseorang untuk menduduki tanah. Ia hanya berkait dengan struktur di atas tanah yang dipanggil "pondok setinggan" yang ditakrif oleh per. 3 Peraturan tersebut. Oleh itu, membaca peruntukan ini bersama-sama dengan per. 10, perayu-perayu boleh, jika mereka berpendapat ianya wajar dan perlu, setelah memberikan penghuni struktur tersebut tujuh hari notis dan setelah luputnya tempoh itu, memulakan tindakan meroboh struktur tersebut. Tiada suatupun di dalam Peraturan tersebut yang menyatakan bahawa penghuni struktur tersebut hendaklah seorang setinggan atau dibuktikan sebagai seorang setinggan. Sebaik sahaja syarat di dalam per. 10(1) Peraturan tersebut dipenuhi, perayu-perayu bebas untuk menjalankan kerja-kerja perobohan dan pengusiran. Oleh yang demikian, membangktikan soal hak menduduki tanah di mana pondok-pondok setinggan didirikan atau mengenai tidak adanya keterangan yang menunjukkan responden-rsponden adalah setinggan-setinggan adalah sesuatu yang menyimpang dan sama sekali tidak relevan.

(3) Walaupun perayu-perayu mungkin telah melakukan kesilapan kerana tidak mencatatkan tarikh ketika mengeluarkan notis-notis tersebut, itu tidak boleh menghalang perayu-perayu dari melaksanakan tugas-tugas sah mereka tersebut sekali lagi, jika keadaan mewajarkan tindakan sedemikian dan jika mereka mematuhi syarat-syarat seperti yang dinyatakan oleh per. 10(1) Peraturan tersebut. Dalam kes ini, jika prayer kedua di lampiran 1 dibenarkan, ia akan secara berterusan menghalang perayu-perayu dari mengambil tindakan terhadap responden-

responden walaupun struktur-struktur yang dibina itu merupakan pondok-pondok setinggan. Ini bukan sahaja tidak adil tetapi tidak munasabah. Jika dibenarkan, perayu-perayu akan dihalang dari melaksanakan tugas-tugas mereka di bawah undang-undang walaupun dalam keadaan-keadaan yang berbeza. Perintah sedemikian, jika diberi, akan menjadi satu injunksi kekal dengan akibat-akibat yang berpanjangan. Pertama, ia secara tidak langsung akan mencipta hak kekal untuk responden-responden terus menduduki tanah dan struktur-struktur. Kedua, ia mungkin akan menghalang pemilik berdaftar tanah untuk meminta bantuan perayu-perayu di bawah per. 6(1) and 7 Peraturan tersebut untuk mengusir responden-responden dari tanah tersebut jika binaan-binaan mereka didapati merupakan pondok-pondok setinggan.

Case(s) referred to:

American Cyanamic Co v. Ethicon Ltd [1975] AC 396 ***(refd)***

Chief Constable of the North Wales Police v. Evans [1982] 3 All ER ***(refd)***

PP v. Datuk Hj Harun Hj Idris (No 2) [1977] 1 MLJ 15 ***(refd)***

Sidek Hj Muhammad & Ors v. The Government of the State of Perak & Ors [1982] CLJ 244; [1982] CLJ (Rep) 321 FC ***(refd)***

Yusof Awang v. Datuk Bandar Majlis Bandaraya Shah Alam and Majlis Bandaraya Shah Alam [2004] 5 MLJ 360 ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 69(1)

Essential (Clearance of Squatters) Regulations 1969, regs. 2, 3, 6(1), 7, 8, 10(1), 22

Evidence Act 1950, s. 101(1)

Federal Constitution, art. 160(2)

Interpretation Acts 1948 and 1967, s. 3

First Part of the Laws of the Constitution of Selangor, arts. 4, 46, 50, 52(3), 53, 55(1)

Local Government Act 1976, ss. 2, 9, 108

Specific Relief Act 1950, ss. 50, 51(2), 52(1), (3)

Other source(s) referred to:

Professor MP Jain, *Administrative Law of Malaysia and Singapore,* pp 357-359

For the appellants - Ahmad Sharizal Azuar Jimin; M/s Sharizal Jimin & Co
For the respondents - Teng Chang Khim; M/s Teng Chang Khim & Co

[Appeal from High Court, Shah Alam; Originating Summons No: MT1-21-247-2003]

Reported by Suresh Nathan

A

JUDGMENT

Mohd Ghazali Yusoff JCA:

[1] This decision is not unanimous. There has been a division of opinion in this quorum. The majority opinion of Denis Ong Jiew Fook and Mohd Ghazali Mohd Yusoff (CAJJ) concur that this appeal be allowed and we make the orders as specified in the last paragraph of the judgment. Our learned brother, James Foong Cheng Yuen, JCA dissents. His opinion is that this appeal be dismissed in part only, namely, that the declaration granted as per the first prayer in the originating summons be affirmed and that the appeal in relation to the injunction granted as per the second prayer be allowed.

[2] The 1st appellant is the Mayor of the Shah Alam City Council. The 2nd appellant is the Shah Alam City Council, a local authority within the meaning of the Local Government Act 1976 ("the Act"). The respondents are individuals who are occupants of 2 pieces of land known as GRN 43019, Lot 37448 and GM 1849, Lot No. 17494 Mukim Kapar, Daerah Klang, Selangor (hereafter referred to as "the said property"). At the material time the owner of the said property is a company named Hock Hup Developments Sdn Bhd (now renamed as Ken Rimba Jaya Sdn Bhd).

[3] On 15 October 2003 the appellants served notices pursuant to reg. 10 of the Essential (Clearance of Squatters) Regulations 1969 (hereafter referred to as "the said regulations") on the 1st to the 9th respondents. Similar notices were served on the 10th, 11th and 12th respondents on 16 October 2003. These notices (hereafter referred to collectively as "the said notices") essentially informed the respondents that they have constructed or are occupying squatter huts on the said property and hence have committed an offence under the said regulations. As such they were required within 7 days from the date of the notices to remove any person or moveable property and demolish their respective squatter huts. It was stated therein that if the respondents fail to comply with the notice, the appellants will take the necessary action without further notice.

[4] By virtue of the Essential (Clearance of Squatters) Regulations (Selangor) Order 1969, the said regulations shall apply to the State of Selangor. It would be appropriate at this stage to reproduce the relevant provisions of the said regulations. Regulation 2, an interpretation provision, provides, *inter alia*, as follows:

> "occupier" means the person in actual occupation of the land or building in respect of which the word is used, or having the charge, management or control thereof either on his own account or as agent of another person, but does not include a lodger;
>
> "private land" means any land other than State land, reserved land, mining land or forest land;
>
> "squatter hut" means any house, hut, shed, stall, lean-to, shelter, roofed enclosure or any extension or structure attached to any building or other erection, of whatever materials made and whether used for the purpose of a human habitation or otherwise which has been erected or is in the course of erection otherwise than in accordance with a plan approved by a local authority or in respect of which a licence issued by a local authority has been cancelled, withdrawn or has expired and is situated on any land;.

[5] The said property is private land and hence regs. 6, 7, 8 and 10 found in Part III of the said regulations entitled "Private Land" would be relevant; they read:

> **6. Owner to demolish squatter huts on his land.**
>
> (1) The owner of any private land shall upon being served with a notice in writing by a local authority demolish the squatter hut on his land within such period as the local authority may in the notice specify.
>
> (2) Upon the demolition of the squatter hut on the land referred to in the notice, the owner shall forthwith inform the local authority of the fact.
>
> **7. Owner may request the local authority to demolish squatter huts on his land.**
>
> In the case where the owner is unable to demolish the squatter hut within the time specified in the notice referred to in regulation 6, the owner may request the local authority to carry out the requirements of the notice in which case the owner shall:

(a) deposit with the local authority such sum of money (in the form of cash or Banker's Guarantee) as the local authority may deem sufficient for the purpose of meeting the cost and expenses of:

(i) demolishing the squatter huts;

(ii) removal of the movable property found in the squatter hut on the land at a rate not exceeding $40 for every trip made by wagon for the purpose of the removal and storage;

(iii) storing the movable property at the rate of $5 per day if it is not claimed on the day the movable property is removed;

(iv) any other activities incidental to or arising out of subparagraphs (i), (ii) and (iii); and

(b) indemnify and keep indemnified the local authority against any claim, damage, loss, action or proceedings that may be brought against the local authority including any cost and expenses arising out of and incidental to sub-paragraphs (i), (ii), (iii) and (iv) of paragraph (a).

8. Local authority may demolish squatter hut in pursuance of regulation 7.

A local authority, its agents or servants may in pursuance of regulation 7, after giving 7 days' notice in writing to the occupier:

(a) enter by day or by night the land for the purpose of summarily demolishing any squatter hut; and

(b) remove any person or movable property in any squatter hut; and

(c) summarily demolish any squatter hut on the land.

10. Local authority may demolish squatter hut without owner's request.

(1) If in the opinion of a local authority it is expedient and necessary to do so having regard to the public interest then notwithstanding regulations 6 and 7, the local authority, its agents or servants may, after giving 7 days' notice in writing to the occupier:

(a) enter by day or by night any private land for the purpose of summarily demolishing any squatter hut; and

(b) remove any person or movable property in any squatter hut;

(c) summarily demolish any squatter hut on the land.

(2) ... .

11. Voluntary arrangements as alternative to regulations 6, 7, 8 and 10.

Nothing in regulations 6, 7, 8 and 10 shall prevent a local authority from entering into any voluntary arrangement with the owner if the arrangement is equitable and is in the opinion of the local authority to be in the public interest.

[6] In relation to service of notices, reg. 22 entitled "Service of Notices" has been repealed. It is now governed by s. 108 of the Act which reads:

108. Notices, etc.

(1) Notices, orders, warrants, licences, receipts and other similar documents may be in print or partly in writing and partly in print.

(2) Service of a document on any person shall be effected:

(a) *by delivering the same to such person or by delivering the same at the last known place of residence of such person to an adult member of his family;*

(b) *by leaving the same at the usual or last known place of residence or business of such person in a cover addressed to such person;* or

(c) by forwarding the same by post in a prepaid letter addressed to such person at his usual or last known place of residence or business.

(3) *A document required to be served on the owner or occupier of any premises shall be deemed to be properly addressed if addressed by the description of the "owner" or "occupier" of such premises without further name or description and may be served by delivering the same to some adult person on the premises or, if there is no such person on the premises to whom the same can with reasonable diligence be delivered, by fixing the same on some conspicuous part of the premises.* (emphasis added)

[7] The said notices that were served on the respondents were worded as follows:

PERATURAN-PERATURAN PERLU
(PEMBERSIHAN SETINGGAN-SETINGGAN 1969)
NOTIS MEROBOH BANGUNAN
(PERATURAN 10)

Adalah dimaklumkan bahawa satu siasatan/bancian telah dijalankankan dan didapati tuan/puan telah mendirikan/mendiami binaan setinggan di - *(address)* - tanpa kebenaran dari pihak Majiis.

2. Oleh yang demikian, tuan/puan didapati melakukan kesalahan di bawah Peraturan-Peraturan Perlu (Pembersihan Setinggan-Setinggan) 1969. Tuan/Puan dikehendaki dalam tempoh 7 hari dari tarikh notis ini supaya menjalankan kerja-kerja yang perlu bagi maksud itu iaitu:

(a) mengalihkan apa-apa orang atau harta alih dan

(b) merobohkan apa-apa binaan di atas tanah tersebut.

SILA AMBIL PERHATIAN sekiranya tuan/puan didapati gagal/engkar mematuhi notis ini sehingga luput tempoh masa yang ditetapkan, pihak Majlis boleh mengambil tindakan tanpa sebarang notis selanjutnya ditetapkan lagi.

Apa-apa kerosakkan dan kerugian adalah tanggungjawab tuan/puan sendiri. Pihak Majiis tidak akan memberi sebarang tuntutan gantirugi. Pihak Majlis juga akan menuntut kos dalam mengambil tindakan di atas.

(Sign.)

b/p Datuk Bandar
Majlis Bandaraya Shah Alam

PENERIMAAN NOTIS

Saya - (name) - mengaku telah menerima notis seperti di atas.

(Sign.) Tarikh:
No. Kad Pengenalan:

[8] The said notices were purportedly served on the 1st and the 4th to the 9th respondents or "to some adult person on the premises" on 15 October 2003 and the 10th, 11th and 12th respondents on 16 October 2003. In relation to the 2nd and 3rd respondents, the notices were purportedly affixed "on some

conspicuous part of the premises". None of the respondents or the "adult person on the premises" acknowledged receipt of the said notices.

[9] On 21 October 2003 the respondents (plaintiffs) filed an originating summons against the appellants (defendants) and prayed for the following reliefs:

(i) that the said notices issued by the appellants under reg. 10 of the said regulations be declared as null and void; and

(ii) that the appellants be restrained from evicting the respondents by any manner whatsoever from the said property including harassing and threatening the respondents.

[10] We must mention here that prior to the hearing of the originating summons the learned judge, Suriyadi J had on 6 November 2003 granted an interim injunction pending its disposal. The appellants appealed against that decision. We have not been enlightened as to whether that appeal has been disposed off or is still pending hearing. Be that as it may, the learned judge's grounds of decision on the granting of that interim injunction was reported in the Malayan Law Journal (see *Yusof bin Awang v. Datuk Bandar Majlis Bandaraya Shah Alam and Majlis Bandaraya Shah Alam* [2004] 5 MLJ 360). Subsequently, in granting the orders prayed for by the respondents in the originating summons, the learned judge reproduced his grounds of decision in relation to the interim injunction that he granted earlier as part of his judgment. This was how he put it in his grounds of decision in relation to the instant appeal:

> To assist the Appeal Court's panel deal with the current appeal, without the necessity of having to suffer the indignity of administrative glitches, I herewith reproduce the very same grounds that I had prepared for the appeal against my of November 6, 2003 decision:

[11] At the end of the day, the learned judge granted the declaration prayed for and granted the injunction. The learned judge's grounds of decision in the originating summons is basically similar to his earlier grounds of decision when he granted the interim injunction.

[12] We would now deal with his grounds of decision, as it is, in relation to the instant appeal (pp. 18-66 of the appeal record). At the outset, the learned judge said that even though the prayers in the originating summons and the application for interim injunction "differed in their respective relief, bearing in mind that the facts were applicable to both the applications I had not hesitated in granting the orders prayed for by the plaintiffs". The learned judge then highlighted the facts as ventilated before him, namely:

(i) it was the policy of the State Government of Selangor to enforce the program of squatter cleansing from the State;

(ii) the appellants had received "discreet instructions" from the State Secretary's office pursuant to the directions of the State Executive Council that all structures standing on the said property be demolished;

(iii) the very part of the said property occupied by the respondents has been earmarked for that program which inevitably meant the demolition of the respondents' houses;

(iv) the developer appointed to develop the said property has made the following offer to all occupants of squatter huts existing on the said property and which included the respondents, namely:

(a) low cost apartments to be built on the said property will be offered to the occupants of the squatter huts at a cost of RM35,000 per unit;

(b) an *ex-gratia* payment of RM7,200 to each family; and

(c) an exemption from the 10% payment of any bank loan in the event the offer to purchase an apartment unit is taken up.

It was pointed out by the appellants that the 4th, 5th, 7th and 9th respondents had taken up the offer and had signed agreements in relation thereto. Be that as it may, in pursuing the orders prayed for in the court below, the respondents canvassed, *inter alia*, the following grounds:

(i) the said notices were undated and defective;

(ii) the notices contravened the said regulations;

(iii) the respondents never received any eviction notices from the owner of the said property prior to the said notices; A

(iv) the appellants had acted *ultra vires* the said regulations.

[13] In relation to reg. 10 of the said regulations, the learned judge was of the view that the "preconditions" found therein are "quite stringent" and "unless the relevant ingredients have been fully satisfied the invocation of the rule will not be permitted". He then said: B

> In crystal clear terms, the above rule requires a subjective opinion to have been formulated by the defendants, before the draconian provision is adhered to. Here, not only is there no independent evidence to establish that the actions had come about as a result of a subjective deliberation, but brazenly admitted that the drastic action undertaken was in response to some administrative direction of another entity. Interestingly enough, the direction of the State Secretary apart from it being irrelevant, not only did not come about as a by-product of its own study and deliberation, but derived from another source, ie the State Exco. Evidentially, apart from the question of how the Exco arrived at that conclusion being a total mystery, let alone the conclusion being twice removed, it was thus tainted on the premise of it being hearsay based. Regardless of the dearth of evidence considered by the State Exco (certainly not a local authority), it was quite clear to the court that the defendants had never exercised its mind to subjectively conclude that it was expedient and necessary to demolish the houses in the interest of the public. This surely was a serious flaw, which prima facie was not in consonant with the prerequisite of the impugned provision, necessitating the stopping of the defendants in their tracks before any inconsolable damage was done prior to the trial. C D E F G

In relation to the said notices, the learned judge said:

> A scrutiny of them will reveal that the defendants had stated that they had allegedly carried out an inquiry/census, and had further asserted that the plaintiffs have built squatter structure, which were an infringement pursuant to the impugned law. To begin with, the issue of inquiry/census was without foundation as none was carried out, bearing in mind that the action which culminated in these notices, was pursuant to a third party's direction. H I

He then concluded as follows:

> To summarize the matter, I had found the action of the defendants to be flawed on many grounds, *inter alia*:
>
> (i) failure of the defendants to formulate their own opinion (subjective) as required by rule 10;
>
> (ii) failure of good service of the relevant notices on the plaintiffs;
>
> (iii) the notices being misleading and hence invalid; and
>
> (iv) failure to establish that the plaintiffs were squatters in the context of r. 10.

[14] Thus, based upon the above reasons the learned judge granted the declaration and injunction prayed for.

[15] The respondents have filed this application for the two reliefs which, to us, would denote that the said notices were served on them or were brought to their attention within the contemplation of s. 108 of the Act. The facts showed the following:

(i) the 1st, 4th, 6th, 8th, 9th, 10th and 12th respondents refused to acknowledge receipt of the notices addressed to them and hence the words "tiada kerjasama" (no co-operation) were endorsed on their respective notices by the appellants;

(ii) the notices addressed to the 2nd and 3rd respondents were served by affixing it on their respective squatter huts;

(iii) the notice addressed to the 5th respondent was served on his wife and she refused to acknowledge receipt and hence the words "tiada kerjasama" (no co-operation) were endorsed on the notice by the appellants;

(iv) the notice addressed to the 7th respondent was served on a female person by the name of Normayani binti Othman and she refused to acknowledge receipt and hence the words "tiada kerjasama" (no co-operation) were endorsed on the notice by the appellants;

(v) the notice addressed to the 11th respondent was served on the 12th respondent who, from the address stated therein, was living next door and he refused to acknowledge receipt of it.

[16] The respondents have now prosecuted the matter by seeking the reliefs sought for. It was their main contention that they cannot be evicted, implying they have a right to occupy the said property and have an interest therein. They claimed they are occupiers with their own buildings on the said property. They have not however shown anything to denote they are in lawful occupation of the said property and that the buildings they owned were erected in accordance with plans approved by the second appellant being the local authority. The appellants' main reason in issuing the said notices were that the buildings erected by the respondents on the said property are "squatter huts" within the meaning assigned thereto under the said regulations. If it was the respondents' case that these buildings were erected with plans approved by the second appellant, all they need to do is to show to the appellants the documents pertaining to that approval upon receipt of the said notices instead of challenging the same by this application. They however have decided to attack the said notices by contending, *inter alia*, that the same were undated and therefore "scandalous, frivolous and vexatious" and were not signed and stamped by the appellant's authorized and "gazetted" legal representatives. They even contended that the appellants had never approved or "gazetted" and adopted the said Regulations as their bye-laws, notwithstanding the existence of the Essential (Clearance of Squatters) Regulations (Selangor) Order 1969, and hence has no jurisdiction to act under the said regulations. We cannot fathom these arguments. Another argument canvassed by the respondents was that the appellants were not the registered proprietors of the said property by virtue of the National Land Code ("the Code"). Further, the appellants were not the "State Authority" as provided by the Code.

[17] It is our view that under the circumstances of this instant appeal, all the second appellant need to do is, once it is of the opinion that it is expedient and necessary after taking into account the public interest to demolish any squatter hut as defined under reg. 3 of the said regulations situated on the said property, to give 7 days notice to the respondents and at the end of that period, enter on the said property for the purpose of demolishing the

A squatter huts. It was argued that the said notices were not dated and hence null and void. We would think this omission, if at all it was one, cannot nullify the said notices. The respondents cannot dispute that they were not aware of the said notices as they have deemed it fit to challenge the said notices by pursuing this
B application. The said notices were served on them in compliance with the provisions of s. 108 of the Act, *viz.*, by delivering the same to such person or delivering the same at the last known place of residence of such person to an adult member of his family or leaving the same at the usual or last known place of residence
C or by fixing the notices on some conspicuous part of the premises.

[18] The evidence showed that the said notices were served on the 1st to the 9th respondents on 15 October 2003 and the 10th to the 12th respondents on 16 October 2003. As the said notices
D were not dated, the 7 days period would run from the date of service of the said notices. We cannot see how it can be argued that the said notices are defective just because the same were not dated. The said notices clearly state that the occupier of the squatter hut has 7 days to move any moveable property from the
E premises and to demolish the squatter hut. Regulation 10 of the said regulations clearly states a local authority may enter the private land in question "after giving 7 days' notice to the occupier" to demolish the squatter hut. In our view, time would start running from the date such a notice is served. As such the
F argument that the said notices were defective being undated or that it were misleading cannot hold water. We cannot see how the respondents were prejudiced by this omission in relation to date when time would only start running after 7 days, *viz.*, from the date of service of the said notices.

G

[19] Another point canvassed by the respondents was that the appellants failed to establish that the respondents are squatters. We would think that the issue in the instant appeal is whether the buildings erected and owned by the respondents are "squatter
H huts". The definition of "squatter hut" in reg. 3 of the said regulations is very clear. Section 101(1) of the Evidence Act 1950 provides "whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist". Thus, the
I respondents must prove that their respective buildings were erected with plans approved by the local authority, i.e., the second

appellant. They have not even shown that they are in lawful occupation of the said property. It is an undisputed fact that the registered owner of the said property is Hock Hup Developments Sdn Bhd (now known as Ken Rimba Jaya Sdn Bhd) and not the respondents. Being squatters, having not shown otherwise, they have no right in law or equity. In *Sidek bin Haji Muhammad & 461 Ors v. The Government of the State of Perak & Ors* [1982] CLJ 244; [1982] CLJ (Rep) 321, Raja Azlan Shah CJ (Malaya) (as His Majesty then was) said:

> It is well established that a court of equity will never assist squatters to resist an order of possession illegally acquired; it will never intervene in aid of wrong-doers. (See *Grafton v. Griffin*). We would like to say this at once about squatters. The owner is not obliged to go to the courts to obtain an order of possession. He is entitled if he so wishes, to take the remedy into his own hands. He can go in himself and turn them out without the aid of the courts of law. He can even use force, so long as he uses no more force than is reasonably necessary. He will not then be liable either criminally or civilly. This however is not to be encouraged because of the disturbance which might follow but the legality of it is beyond question.

[20] We find no merit in relation to the respondent's argument that the appellants were not the registered proprietors under the Code. Regulation 10 of the said regulations clearly provides that a local authority may enter on any private land for the purpose of demolishing any squatter hut. Thus, we simply cannot see why this argument was canvassed when it has no bearing at all on the matter before this court. In the same light, we also simply cannot see why there was a need for the respondents to point out to this court in its submission that the appellants were not the "State Authority" under the Code. Under the Code the words "State Authority" means the Ruler or Governor of the State, as the case may be. We cannot find anywhere in the appeal record that the appellants have contended that they are the "State Authority".

[21] What the respondents have applied for in these proceedings is for a declaration that the said notices are null and void and for an order that the appellants be restrained from evicting the respondents by any manner whatsoever from the said property including harassing and threatening the respondents who are occupying the said property, in other words, a perpetual injunction. From our reading of his grounds of decision, we are of

A the view that the learned judge seems to have erroneously approached this matter as if it was an application for judicial review. The respondents have challenged the legality of the said notices by applying for a declaration that the said notices are null and void for the reasons discussed earlier one of which was that
B the appellants have acted *ultra vires* the said regulations. In other words, the appellants' decision to issue the said notices, was contrary to law. We would have thought that such a decision should be challenged by way of judicial review in the form of perhaps an application for writs of *certiorari* or prohibition. In his
C book entitled *Administrative Law of Malaysia and Singapore,* Professor M.P. Jain said (at pp. 357-359):

> The writs of *certiorari* and prohibition have so much in common that they can be considered together. *Certiorari* is the most
D commonly invoked writ in modern Administrative Law. The reason is that it is the principal means of invoking judicial review over the determinations already come into existence. But the parameters of *certiorari* and prohibition have been expanding in recognition of the need to impose judicial review over adjudicatory bodies. To-day, *certiorari* goes not only to a body discharging a
E quasi-judicial function, but to any body determining the rights of the people. The modern trend is that wherever there is power to determine questions affecting the rights of persons, there is a duty to act judicially and such a determination is subject to certiorari. Certiorari has thus emerged into a general remedy for the control
F of decisions by the administration affecting rights of the people. Similar is the case with prohibition. As Lord Denning observed in *Regina v. Greater London Council* [1976] 1 WLR 550:
>
> > Just as the scope of *certiorari* has been extended to administrative authorities, so also with prohibition. It is
> G available to prohibit administrative authorities from exceeding their powers, or misusing them. In particular, it can prohibit a licensing authority from making rules or granting licences which permit conduct that is contrary to law.
>
> *Certiorari* is issued not only to a statutory body but even to a
H non-statutory body which is under a duty to act judicially and performing a public duty. It is not even confined to 'enforceable rights'.
>
> *Certiorari* and prohibition differ from each other from a functional point of view. *Certiorari* is issued when the body in question has
I completed its work, disposed of the matter and given its determination; certiorari is thus issued to quash such a determination. Prohibition is used to prohibit a body from

> continuing with the case further. It is issued when the body concerned is still seised of the matter and has not yet completed its determination. There is thus a difference in stages of the proceedings when the two writs may be issued. These writs are issued on a few grounds only as it is not the policy of Administrative Law to interfere too much with the working of the bodies established by the legislature to decide controversies. *Certiorari* is issued when an adjudicatory body has infringed norms of natural justice, or acts under an invalid law, or commits errors of jurisdiction, or there is an error of law apparent on the face of the record, or where its decision is based on findings of fact for which there is no legal evidence to support. In general, prohibition lies on every such ground on which certiorari would lie if proceedings were completed. Most commonly, prohibition is used when a body has exceeded its jurisdiction, or embarked on a determination outside its jurisdiction, or when principles of natural justice have been infringed.

[22] The learned judge, as reflected in his grounds of decision, found that the appellants took action under the said regulations in response to "some administrative direction" of the State Secretary of Selangor and that that direction is irrelevant and furthermore it did not come about as a by-product of the appellant's "own study and deliberation, but derived from another source, ie, the State Exco". As such, he ruled "that the defendants had never exercised its mind to subjectively conclude that it was expedient and necessary to demolish the houses in the interest of the public" and that "this surely was a serious flaw". He was of the view that since it was the State Exco who directed the appellants, through the State Secretary, to take action under reg. 10 of the said regulations, the opinion of the appellants that it was "expedient and necessary" to demolish the squatter huts occupied by the respondents having regard to "public interest" is seriously flawed. From our reading, the learned judge made a review of the manner in which the decision was made by the appellants as if the originating summons filed by the respondents was an application for judicial review. He seemed to have been more concerned with the decision-making process by the appellants and not with the decision itself. In *Chief Constable of the North Wales Police v Evans* [1982] 3 All ER; [1982] 1 WLR 1155 at p. 1173, Lord Brightman said "Judicial review is concerned, not with the decision, but with the decision-making process".

[23] A perusal of the articles of the State Constitution of Selangor and the provisions of the Act would show that the learned judge's findings and assessment of the law was erroneous. Section 2 of the Act provides "State Authority" means in relation to the States of West Malaysia "the Ruler-in-Council or Governor-in-Council of a State and includes in Negeri Sembilan, the Yang di-Pertuan Besar acting on behalf of himself and the Ruling Chiefs". Incidentally, s. 3 of Part I of the Interpretation Acts 1948 and 1967 (Consolidated and Revised-1989) which applies to all laws, whether enacted before or after the commencement of the Interpretation Act 1967, revised under the Revision of Laws Act 1968 provides that the word "State Authority" means "the Ruler or Yang di-Pertua Negeri of a State and includes, in Negeri Sembilan, the Yang di-Pertuan Besar acting on behalf of himself and the Ruling Chiefs".

[24] Article 4 of the First Part of the Laws of the Constitution of Selangor (hereafter referred to as "the State Constitution") provides the "Sultan" means "the Ruler of Selangor and includes His Successors". Article 46 of the State Constitution provides "His Highness" means "the Head of State and includes His successors and where the context admits, His predecessors; and in the case of a Regency includes the Regent or if there is a Council of Regency such Council". Article 46 also provides that the words "State Executive Council" means the Majlis Mesyuarat Kerajaan established under the provisions of this Part". Consequently, art. 53 provides that His Highness shall appoint a Majlis Mesyuarat Kerajaan to be called in English the State Executive Council. As a consequence of adopting constitutional monarchy, His Highness is vested with the executive authority of the State but as a constitutional ruler he is to act in accordance with the advice of the State Executive Council or a member thereof acting under the general authority of the State Executive Council. This is clear from arts. 50 and 55(1) of the State Constitution.

Article 50 reads:

> The executive authority of the State shall be vested in His Highness and exercisable, unless otherwise provided by the Federal Constitution or this Constitution, by him or by the State Executive Council or any member of the State Executive Council authorised by the State Executive Council, but executive functions may by law be conferred on other persons or authorities.

Article 55(1) reads:

> (1) In the exercise of His functions under this Constitution or any law or as a member of the Conference of Rulers, His Highness shall act in accordance with the advice of the State Executive Council or of a member thereof acting under the general authority of the Council except as otherwise provided by the Federal Constitution or this Constitution, but shall be entitled at His request to any information concerning the Government of the State which is available to the State Executive Council.

[25] Article 52 provides there shall be constituted, *inter alia*, the office of State Secretary and his appointment thereto shall be made by the appropriate Service Commission from among members of any of the relevant public service. The State Secretary shall be the principal officer in charge of administrative affairs of the State (art. 52(2)) and such official shall have the right to take part in the proceedings, *inter alia*, of the State Executive Council and may be appointed to any Committee thereof (article 52(3)).

[26] Thus in the exercise of his functions under the law, a Ruler of a State shall act in accordance with the advice of the State Executive Council and this would of course encompass the powers that a Ruler, as the State Authority, have under the provisions of the Act. As stated by Raja Azlan Shah FJ (as His Highness then was) in *PP v. Datuk Haji Harun bin Haji Idris (No. 2)* [1977] 1 MLJ 15, at p. 20:

> It is the Executive Council who is the executive organ of the State Authority and exercise executive functions in the name of the Ruler.

[27] Section 3 of the Act provides the State Authority may by notification in the Gazette declare any area in such a State to be a local authority for that area. Section 8 provides the affairs of every local authority area shall be administered by a local authority. Section 9 of the Act entitled "Power of State Authority to issue directions" reads:

> (1) The State Authority may from time to time give the local authority directions of a general character, and not inconsistent with the provisions of this Act, on the policy to be followed in the exercise of the powers conferred and the duties imposed on the local' authority by or under this Act in relation to matters which appear to the State Authority to affect the interests of the local authority area, and the local authority shall as soon as possible give effect to all such directions.

A (2) The local authority shall furnish the State Authority with such returns, accounts and other information with respect to the property and activities of the local authority as the State Authority may from time to time require. (emphasis added)

B **[28]** What is clear in s. 9 of the Act is that it is the State Authority, ie, the State Executive Council which determines policy. The learned judge acknowledged the fact that it was the policy of the State Authority to enforce the program of squatter cleansing, as he put it, in the State of Selangor. A policy such as that would necessitate the relevant authorities to take action and to clear away squatter huts to enable, *inter alia*, land owners to develop their land in an orderly manner which in turn would benefit the public in the form of infrastructure, proper drainage, roads and other form of amenities and utilities. Section 9 of the Act empowers the State Authority to issue directions to a local authority on the policy to be followed and the State Secretary, an *ex-officio* member of the State Executive Council and also the head of administration of the State Government, would surely be the most appropriate official to inform the appellants of the policy.

E **[29]** In the light of the articles of the State Constitution of Selangor referred to earlier and the provisions of the Act, we cannot fathom the views of the learned judge, reproduced earlier, in relation to reg. 10 of the said regulations. The "direction of the State Secretary" of Selangor certainly cannot be said to be F "irrelevant" as put by the learned judge. Consequently, the State Authority, is clearly entitled, by virtue of s. 9 of the Act to give directions to a local authority on policy matters and the local authority "shall as soon as possible give effect to all such directions" which would certainly include exercising its powers G under reg. 10 of the said regulations. In relation to this, we would say, with respect, that the learned judge has misconstrued reg. 10 of the said regulations by reading into it "preconditions" as he put it which have to be satisfied by the appellants before reg. 10 can be "invoked".

H **[30]** We would reiterate that the learned judge had erred in approaching this matter, as we have said earlier, as if it was a judicial review as his main ground for allowing the declaration was based on his findings on the "decision-making process" of the I appellants, *viz.*, he reviewed the decision-making process of the

appellants and came to the conclusion that it was flawed and hence quashed that decision by concluding that it contravenes the said regulations.

[31] We are of the view that the learned judge also erred in law in granting the second prayer, *viz*., the perpetual injunction. According to *Osborn's Concise Law Dictionary* (7th edn) a perpetual injunction "is granted only after the plaintiff has established his right and the actual or threatened infringement of it by the defendant". Section 50 of the Specific Relief Act 1950 (SRA) provides preventive relief is granted at the discretion of the court by injunction, temporary or perpetual. Section 51(2) of the SRA provides:

> A perpetual injunction can only be granted by the decree made at the hearing and upon the merits of the suit; the defendant is thereby perpetually enjoined from the assertion of a right, or from the commission of an act, which would be contrary to the rights of the plaintiff.

[32] The effect of the perpetual injunction granted in this instant appeal would be tantamount to the respondents having established their right that they can continue to occupy the squatter huts erected on the said property and that the appellants cannot take any fresh action or act further under reg. 10 of the said regulations against the respondents. The perpetual injunction would also be tantamount to vesting of a right to remain on the said property and indirectly the vesting of a right to occupy land by prescription, *viz*., the vesting of a right by reason of lapse of time. In other words, a title by prescription, which is of course foreign to our land law. Our Code clearly does not all provide for right to remain on land or right to occupy land by prescription.

[33] With respect to the learned judge, he did not seem to have given due consideration to the scope and purpose of the said regulations and for whose benefit it is intended. Section 52(1) of the SRA provides a perpetual injunction may be granted to prevent the breach of an existing obligation in favour of the applicant, whether expressly or by implication.

Section 52(3) of the SRA provides as follows:

> When the defendant invades or threatens to invade the plaintiff's right to, or enjoyment of, property, the court may grant a perpetual injunction in the following cases, namely:

A (a) where the defendant is trustee of the property for the pIaintiff;

(b) where there exists no standard for ascertaining the actual damage caused, or likely to be caused, by the invasion;

B (c) where the invasion is such that pecuniary compensation would not afford adequate relief;

(d) where it is probable that pecuniary compensation cannot be got for the invasion; and

C (e) where the injunction is necessary to prevent a multiplicity of judicial proceedings.

From our reading, the respondents do not at all fall within the contemplation of s. 52(3) of the SRA. The subject matter are squatter huts as defined under reg. 3 of the said regulations. D Squatters have no right either in law or equity.

[34] The 2nd appellant is clearly a public authority and it exercises public functions as local authority. The meaning assigned to the expression "public authority" in the Federal Constitution E also includes a local authority (see art. 160(2)). In an application for an injunction where a public authority is involved, it is the duty of the court to consider the injury or inconvenience which may result to the public or whether it would be detrimental to public interest and welfare in case an injunction is granted. To grant the F perpetual injunction under the circumstances of this case would have the effect of nullifying the said regulations. The appellants have a statutory duty to perform under the said regulations and once they decide to act under the same, they cannot be prevented from doing so by a perpetual injunction. We are also of the view G that the granting of the perpetual injunction was an unwarranted exercise of discretionary powers. We would also think that this relief prayed for is beyond the jurisdiction of the court.

[35] The respondents have not shown that there was a H threatened invasion of their legal rights. The court of course has jurisdiction to protect property from an act threatened. But then the court, before granting an injunction to restrain the appellants from interfering with the respondents' occupation or possession, must first go into the question of the respondents' right to occupy I the said property. This, the learned judge has failed to do so. As we have stated earlier, this is not a case of a judicial review of

the appellant's decision or an abuse of discretion in the exercise of powers under the said regulations or a case where statutory regulations conferring powers on an authority for one purpose have been used for a different purpose. The respondents have to show they are not squatters and have a legal right to occupy the land and that their abode is not a squatter hut. This they have failed to do so.

[36] For the reasons aforesaid, we would allow this appeal with costs here and below to be taxed and set aside the orders granted by the High Court on prayers (i) and (ii) of the originating summons and order that the deposit be refunded to the appellants.

James Foong JCA:

Introduction

[37] The respondents have filed an application (encl. 1) in the High Court at Shah Alam for the following reliefs:

1. bahawa Notis Meroboh Bangunan (Peraturan 10) Peraturan-peraturan Perlu (Pembersihan Setinggan-setinggan 1969) tidak bertarikh yang dikeluarkan oleh Datuk Bandar Majlis Bandaraya Shah Alam dan terhadap plaintif-plaintif ("notis tersebut") adalah diisytiharkan sebagai tidak sah dan terbatal;

2. bahawa Datuk Bandar Majlis Bandaraya Shah Alam adalah ditahan daripada mengusir plaintif-plaintif dengan apa cara sekali pun daripada tanah yang dikenali sebagai GRN 43019, Lot No. 37448 dan GM 1849 Lot No. 17494 Mukim Kapar, Daerah Klang, Selangor Darul Ehsan ("Hartanah tersebut") termasuk mengganggu dan mengancam plaintif-plaintif yang menduduki Hartanah tersebut,

[38] On 7 July 2004, the High Court at Shah Alam granted this application with costs to the respondents. Dissatisfied with this decision, the appellants appealed to us.

[39] In their memorandum of appeal, the first ground raised by the appellants is that the learned judge of the High Court has erred in law and fact in allowing the reliefs sought by the respondents by relying on his grounds of decision for a different application (encl. 3). Enclosure 3 is an application by the respondents for an interim injunction pending the disposal of encl. 1.

[40] To understand this, it is necessary for me to set out the background facts of this case.

Facts

[41] The 1st appellant is the Mayor of the town council of Shah Alam whilst the 2nd appellant is the town council itself.

[42] On 23 October 2003, the appellants' servants and/or agents, assisted by the police and workers from the national power company (Tenaga Nasional Berhad) as well as representatives of the registered proprietor of the said land, attempted to demolish the respondents' houses on the said land. They were unsuccessful. The access road to the said land was blocked by a crowd.

[43] After this incident, the respondents filed this application (encl. 1). Aside from this, they also filed an application (encl. 3) for an interim injunction pending the disposal of encl. 1. Enclosure 3 was heard before encl. 1. It was heard *inter parte* and the learned judge allowed this respondents' application. His grounds of judgment is reported in *Yusof bin Awang v. Datuk Bandar Majlis Bandaraya Shah Alam & Majlis Bandaraya Shah Alam* [2004] 5 MLJ 360.

[44] Subsequently, on 7 July 2004, after hearing submissions of parties on encl. 1, the learned judge granted the reliefs sought by the respondents. In his grounds of judgment for this enclosure, the learned judge said that he relied "in toto on the same ground" as what he had decided in encl. 3. He felt that there is no "precedent or law that prevents me (him) from taking this easy course of action". After explaining this he reproduced his entire grounds of judgment given for encl. 3.

[45] It is my view that one should be cautious with such approach. Different legal principle or test may apply to different kinds of application. For instance, in this case, encl. 3 is an application for an interim injunction whereas encl. 1 is for a declaration and an order for a permanent injunction. In the former application (encl. 3), the test to be applied is that as stated in the *locus classicus* case of *American Cyanamic Co v. Ethicon Ltd* [1975] AC 396 where the first factor to be considered is whether "there is a serious question to be tried" before moving on to adequacy of damages and balance of convenience. But in an application for a permanent injunction, this test is no longer appropriate. To

succeed in a permanent injunction, the respondents in encl. 1 are required to prove their case to the required standard as set out in the civil law. So "what sauce is good for the goose is also sauce for the gander" (quoting from the learned judge) may not be apt in a situation like this.

[46] Another shortcoming of this approach is that an issue raised in one application may not be advanced in another. For instance, the learned judge had not touched on the main issue in encl. 1 which is: whether the notices issued by an officer of the 1st appellant under reg. 10 of the Essential (Clearance of Squatters) Regulations 1969 (the said regulations) are valid when they are not dated when considering encl. 3.

[47] Though this approach of basing entirely on the ground given in one application for that of another is not ideal, nevertheless, for the purpose of this appeal, the appellate court has to rely on the grounds as provided by the trial judge.

Analysis

1st Issue: Are the notices issued by the 1st appellant to the respondents valid in law?

[48] Though the other grounds stated in the memorandum of appeal are widely and liberally phrased, I am of the view that essentially they come down to this in respect of the 1st prayer in encl. 1: Whether the notices issued by the 1st appellant to the respondents are valid in law?

[49] To understand why such notices are required to be issued and served on the respondents, I reproduce reg. 10 of the said regulations:

> 10(1) If in the opinion of a local authority it is expedient and necessary to do so having regard to the public interest then notwithstanding regulations 6 and 7, the local authority, its agents or servants may, after giving 7 days' notice in writing to the occupier:
>
> (a) enter by day or by night any private land for the purpose of summarily demolishing any squatter hut; and
>
> (b) remove any person or movable property in any squatter hut; and

A (c) summarily demolish any squatter hut on the land

(2) If the local authority demolishes any squatter hut in pursuance of this regulation, then the owner shall pay to the local authority a sum of money to meet the cost and expanses of ... and shall indemnify and keep indemnified the local authority against any
B claim, damage, loss, action or proceedings that may be brought against the local authority including any cost and expenses arising out of and incidental to ...

[50] Each of these notices served on the respondents is divided
C into two sections. The top section bears the logo and address of the 2nd appellant. Then just beneath it is the name of the addressee. And below this, it reads:

PERATURAN-PERATURAN PERLU
(PEMBERSIHAN SETINGGAN-SETINGGAN 1969)
D NOTIS MEROBOH BANGUNAN
(PERATURAN 10)

Adalah dimaklumkan bahawa satu siasatan/bancian telah dijalankan dan didapati tuan/puan telah mendirikan/mendiami binaan setinggan di (purported address of the respondents)
E

Tanpa kebenaran dari pihak Majlis.

2. Oleh yang demikian, tuan/puan didapati melakukan kesalahan di bawah Peraturan-Peraturan Perlu (Pembersihan Setinggan-Setinggan) 1969. Tuan/Puan dikehendaki dalam tempoh 7 hari dari
F tarikh notis ini supaya menjalankan kerja-kerja yang perlu bagi maksud itu iaitu:

a) mengalihkan apa-apa orang atau harta alih dan

b) merobohkan apa-apa binaan di atas tanah tersebut.
G

SILA AMBIL PERHATIAN sekiranya tuan/puan didapati gagal/ engkar mematuhi notis ini sehingga luput tempoh masa yang ditetapkan, pihak Majlis boleh mengambil tindakan tanpa sebarang notis selanjutnya ditetapkan lagi.

H Apa-apa kerosakan dan kerugian adalah tanggungjawab tuan/puan sendiri. Pihak Majlis tidak akan memberi sebarang tuntutan gantirugi. Pihak Majlis juga akan menuntut kos dalam mengambil tindakan di atas.

I

Kod Kad Kuasa:

b/p. Datuk Bandar
Majlis Bandaraya Shah Alam

Saya ... mengaku telah menerima notis seperti di atas.

... Tarikh ...

No. Kad Pengenalan: ...

[51] An examination of this notice will reveal that the top section is not dated. Only the bottom part, which is separated by a line drawn across to divide the notice, bears a date. But it is obvious that the bottom section is meant for the recipient to sign on and to insert the date when he received this notice. The date placed on this portion of the notice cannot, by any stretch of imagination, be considered as the date of issuance of this notice. However, despite this glaring fact, the appellants' representative in para. 15 of his affidavit, affirmed on 3 November 2003 (at p. 99 of the appeal record), still maintains that:

> Notis-Notis tersebut sememangnya bertarikh iaitu tarikh pengeluaran Notis tersebut dan ianya telah dengan jelas menyatakan undang-undang bertulis yang telah diguna-pakai dan ... jika dikira hari daripada tarikh operasi roboh yang dirujuk di perenggan 12 dengan tarikh Notis-Notis tersebut dikeluarkan, adalah jelas bahawa Defendan-Defendan mengguna-pakai tarikh pengeluaran Notis-Notis tersebut sebagai tarikhnya.

[52] I agree that there must have been a date when these notices were issued but this date is not written or printed on these notices. This fact cannot be denied. Without a date of issuance how could the respondents know when the 7 day period is to commence. The exact period for compliance with these notices is essential for it accords the respondents an opportunity to pack and go if they are residing in squatter huts to avoid any drastic action of the appellants to demolish their structure and to evict them. This grace period of 7 days, I believed, is based on a humanitarian ground otherwise the makers of such law would not have inserted this requirement into the said regulations. For this, I hold the view that it is essential for the appellants to specifically inform the respondents when this 7 day period is to commence

for without this lead time so given it cannot be said when time begins to tick. Since these notices are without a commencement date, they are therefore invalid and bad in law.

[53] On this ground alone, I find it justified to allow prayer 1 of encl. 1. Though it is true that the learned trial judge had not touched on this principal issue despite having heard arguments on it during the hearing of encl. 1, nevertheless, since this appeal is by way of a re-hearing (s. 69(1) Courts of Judicature Act) I am permitted to arrive at the conclusion as stated

2nd Issue: Are the respondents entitled to a permanent injunction to restrain the appellants from evicting the respondents from the said land by threats or force?

[54] In respect of the 2nd prayer in encl. 1, the issue should be: Whether the respondents are entitled to a permanent injunction to restrain the appellants from evicting the respondents from the said land by force or threats?

[55] It is disappointing to note that in the learned judge's grounds of judgment, he made no direct reference to this. The closest I can get are his remarks that the respondents are not squatters. He expressed this in this fashion:

> Despite the fact that the defendants (appellants) did not own the impugned land no supporting affidavit had been filed by the owners stating that the plaintiffs (respondents) were indeed squatters in the common law sense. I had to bear in mind that this well-known village (Kampong Rimba Jaya) catering for a family of 1074 did not just materialize overnight but had been around for sometime without the landowners complaining. Sir Frederick Pollock in *Pollock on Tort* 15th Edition has occasion to author that:
>
> > A trespasser may in any case be turned off land before he has gained possession, and he does not gain possession until there has been something like acquiescence in the physical fact of his occupation on the part of the rightful owner (emphasis added).
>
> Taking the matter a step further Kevin Gray and Susan Francis Gray in *"Elements of Land Law"* had authored at page 138:

> Licences may assume various forms and perform a multiplicity of purposes. The overlapping categories of the licence recognized by the law include bare licences, contractual licences, equitable or irrevocable licences, licences based on proprietary estoppel and licences with the grant of interest ...
>
> The law of licence reflects the prerogative of the owner or possessor of land to dictate the terms on which access may be enjoyed by strangers ... A 'bare licence' is accordingly a personal permission, granted otherwise than for consideration, to enter and be present upon the land of another ... The bare licence to enter land performs only the minimal function of providing a defence to what would otherwise be the tort of trespass. The licensee's liability in trespass revives when his licence is terminated (emphasis added).

In that context the plaintiffs would certainly qualify as a bare gratuitous licensees regardless of whether there was consideration for the occupation or otherwise. Perhaps due to this tacit approval, implying knowledge and encouragement on the part of the landowners, the village with all their structures had grown to what it is now. Being licencees they (the respondents) thus cannot be trespassers as they were there lawfully on the premises, whether pursuant to a matter of grace or benevolence of the owners.

[56] I am afraid that the learned judge was not able to see the wood for the trees. Regulation 10 of the said regulations is not concerned with the right of a person to be on the land. It relates only to the structure on the land known as "squatter hut", and under reg. 3 of the said regulations "squatter hut" is defined as:

> any house, hut, shed, stall, lean-to, shelter, roofed enclosure or any extension or structure attached to any building or other erection, of whatever materials made and whether used for the purpose of a human habitation or otherwise which has been erected or is in the course of erection otherwise than in accordance with apian approved by a local authority or in respect of which a licence issued by a local authority has been cancelled, withdrawn or has expired and is situated on any land.

[57] So reading this provision with reg. 10, the appellants can, if they are of the opinion that it is expedient and necessary, after giving the occupant of such structure a 7 day notice and upon termination of this period stated in the notice, proceed to demolish

such structure. There is nothing in this regulation to say that the occupant of such structure must be a squatter or be proved a trespasser. As long as the conditions mentioned in reg. 10(1) of the said regulations are fulfilled, the appellants are at liberty to carry out demolition and eviction. Therefore to speak of the right to occupy the land on which the squatter hut is erected and of the absence of evidence to prove that the respondents are squatters is, in my view, completely irrelevant and off the mark.

[58] Though the appellants may have made a slip this time by not inserting a date when issuing the notices but this should not prevent the appellants from carrying out their lawful duties again if circumstances warrant them to do so, and if they comply with the conditions set out in reg. 10(1) of the said regulations. Thus, if the 2nd prayer in encl. 1 is allowed, it would permanently prevent the appellants from taking any action against the respondents regardless of whether their structures on the said land are squatter huts. I do not think that this is fair and reasonable. If permitted, the appellants would be perpetually prohibited from carrying out their legal duties under the law even, as I have said, under different circumstances. Such order if granted, in my view, would tantamount to a perpetual injunction with far reaching consequences. First, it would indirectly create a perpetual right for the respondents to remain permanently on the said land with their structures. Second, this would even prevent the registered owner of the said land from seeking assistance from the appellants under regs. 6(1) and 7 of the regulations to assist in evicting the respondents from the said land if their structures are found to be squatter huts. Section 6(1) and s. 7 of the regulations provide:

> **6. Owner to demolish squatter huts on his land.**
>
> (1) The owner of any private land shall upon being served with a notice in writing by a local authority demolish the squatter hut on his land within such period as the local authority may in the notice specify.
>
> **7. Owner may request the local authority to demolish squatter huts on his land.**
>
> In the case where the owner is unable to demolish the squatter hut within the time specified in the notice referred to in regulation 6, the owner may request the local authority to carry out the requirements of the notice in which case the owner shall:

(a) deposit with the local authority such sum of money (in the form of cash or Bankers' Guarantee) as the local authority may deem sufficient for the purpose of meeting the cost and expenses of:

(i) demolish the squatter hut;

(ii) removal of the movable property ...;

(iii) storing the movable property ...;

(iv) any other activities incidental to or arising out of subparagraphs (i), (ii) and (iii); and

(b) indemnify and keep indemnified the local authority any claim, damage, loss, action or proceedings that may be brought against the local authority ...

[59] All these, I am afraid were overlooked by the learned judge.

Conclusion

[60] Based on the reasons aforesaid, I am of the view that this appeal should be allowed in part. The order of the learned judge dated 7 July 2004 should be substituted to read: 1st prayer in encl. 1 allowed; the 2nd prayer in encl. 1 dismissed; and there should be costs to the plaintiffs for encl. 1.

[61] As the appellant has only partially succeeded in this appeal, there shall be no order as to the costs for this appeal. Deposit for this appeal to be refunded to the appellants.